

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5  
6

7 DISTRICT OF NEVADA  
8  
9

10 UNITED STATES OF AMERICA,  
11

Case No. 3:18-cr-00105-HDM-WGC  
Case No. 3:22-cv-00140-HDM

12 Plaintiff,  
13  
14 v.  
15

16 CLIFTON JAMES JACKSON,  
17

ORDER  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Defendant.  
10

11 Before the court is the defendant Clifton James Jackson's  
12 motion to vacate, set aside, or correct sentence pursuant to 28  
13 U.S.C. § 2255 (ECF No. 125) and supplement (ECF No. 128). The  
14 government has responded (ECF No. 129), and the defendant has  
15 replied (ECF Nos. 130 & 131).

16 **I. Factual and Procedural Background**

17 In a 2012 jury trial before Judge Jones, Jackson was convicted  
18 of one count of possession of a firearm by a convicted felon. (See  
19 Case No. 3:11-cr-00142-HDM). As Jackson qualified as a career  
20 criminal under the Armed Career Criminal Act, 18 U.S.C. § 922(g),  
21 he was sentenced to 180 months in prison. The judgment was affirmed  
22 on appeal.

23 Three years later, the Supreme Court decided in *Johnson v.*  
24 *United States*, 576 U.S. 591 (2015) that the residual clause of the  
25 definition of violent felony contained in the ACCA was  
26 unconstitutionally vague. In light of *Johnson*, the government and  
27 Jackson filed a joint motion for habeas relief that Jackson should  
28 be resentenced without application of the career offender

1 designation, which the court granted. Upon resentencing, Jackson  
2 received a prison term of 60 months, which resulted in his  
3 immediate release from custody.

4 Two years later, Jackson was arrested for various firearms  
5 related offenses and, in addition to being subject to revocation  
6 in Case No. 3:11-cr-00142, was charged with felon in possession of  
7 a firearm and felon in possession of ammunition in the instant  
8 case. This case, as his 2011 case, was originally assigned to Judge  
9 Jones.

10 The two-count indictment was returned on December 13, 2018.  
11 Trial was scheduled to begin on February 11, 2019. At the February  
12 5, 2019, calendar call, however, defense counsel indicated that a  
13 large amount of discovery had just been disclosed by the  
14 government. Counsel stated that although Jackson was not waiving  
15 his speedy trial rights, counsel would not be able to effectively  
16 represent Jackson because they would not have enough time to review  
17 the discovery before trial or to prepare a motion to suppress they  
18 believed might be necessary. The court determined that a  
19 continuation of the trial was in the interests of justice, and  
20 trial was therefore reset to April 8, 2019.

21 On February 26, 2019, Judge Jones recused from this case, and  
22 the case was reassigned to this court. Trial ultimately commenced  
23 on April 10, 2019, resulting in a verdict of guilty on Count One  
24 and not guilty on Count Two.

25 Jackson appealed, arguing among other things that his speedy  
26 trial rights had been violated. The Ninth Circuit affirmed, and  
27 this § 2255 motion followed.

28

**1 II. Standard**

2 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to  
3 vacate, set aside, or correct his sentence if: (1) the sentence  
4 was imposed in violation of the Constitution or laws of the United  
5 States; (2) the court was without jurisdiction to impose the  
6 sentence; (3) the sentence was in excess of the maximum authorized  
7 by law; or (4) the sentence is otherwise subject to collateral  
8 attack. *Id.* § 2255(a).

**9 III. Analysis****10 A. Ground One**

11 In Ground One, Jackson asserts that his right to equal  
12 protection was violated by Judge Jones' decision to exclude from  
13 the speedy trial calculation the delay caused by the government's  
14 late disclosure of evidence. Jackson asserts that for defendants  
15 of other races, other courts have found such delays caused by  
16 government actors are not excludable. (ECF No. 125 at 4). Jackson  
17 asserts the court's ruling was "selective prosecution."

18 The government argues that Ground One is procedurally  
19 defaulted because it was not raised on direct appeal and that, at  
20 any rate, selective prosecution is not a theory that applies to  
21 judicial rulings.

22 "If a criminal defendant could have raised a claim of error  
23 on direct appeal but nonetheless failed to do so, he must  
24 demonstrate" either "cause excusing his procedural default, and  
25 actual prejudice resulting from the claim of error," *United States*  
26 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is  
27 actually innocent of the offense, *Bousley v. United States*, 523  
28 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal

1 ordinarily requires a showing of some external impediment  
 2 preventing counsel from constructing or raising the claim." *Murray*  
 3 *v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires  
 4 the defendant to establish 'not merely that the errors at ... trial  
 5 created a possibility of prejudice, but that they worked to his  
 6 actual and substantial disadvantage, infecting his entire trial  
 7 with error of constitutional dimensions.'" *Bradford v. Davis*, 923  
 8 F.3d 599, 613 (9th Cir. 2019) (internal citation omitted).

9 Jackson could have raised his equal protection and selective  
 10 prosecution claims on direct appeal but did not do so. The claims  
 11 are therefore procedurally defaulted. It is unnecessary to resolve  
 12 whether Jackson can demonstrate cause for the default, because  
 13 even if he could, he cannot demonstrate prejudice.<sup>1</sup>

14 Jackson has not offered any evidence that similarly situated  
 15 defendants were treated differently than he was. None of the cases  
 16 he cites was decided by Judge Jones, and two were not even decided  
 17 in this district. Furthermore, Jackson has not made a persuasive  
 18 argument that the circumstances in any of these cases were so like  
 19 the circumstances of his case so as to be similarly situated.

20 Moreover, the court is unaware of any authority, and Jackson  
 21 provides no such authority, supporting the proposition that  
 22 selective prosecution is a constitutional violation that can be  
 23 committed by a court by virtue of its judicial rulings.  
 24 Accordingly, Jackson cannot show prejudice to excuse the  
 25 procedural default, and Ground One must therefore be dismissed.

26

27

---

28 <sup>1</sup> Jackson does not argue actual innocence.

## 1       B. Ground Two

2       In Ground Two, Jackson asserts that his counsel rendered  
 3 ineffective assistance by: (1) requesting a continuance over his  
 4 objection; and (2) failing to move to dismiss the indictment for  
 5 violation of the Speedy Trial Act. (ECF No. 125 at 5).

6       Ineffective assistance of counsel claims are governed by  
 7 *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*,  
 8 a petitioner must satisfy two prongs to obtain habeas relief—  
 9 deficient performance by counsel and prejudice. 466 U.S. at 687.  
 10 With respect to the performance prong, a petitioner must carry the  
 11 burden of demonstrating that his counsel's performance was so  
 12 deficient that it fell below an "objective standard of  
 13 reasonableness." *Id.* at 688. "'Judicial scrutiny of counsel's  
 14 performance must be highly deferential,' and 'a court must indulge  
 15 a strong presumption that counsel's conduct falls within the wide  
 16 range of reasonable professional assistance.'" *Knowles v.*  
 17 *Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). In  
 18 assessing prejudice, the court "must ask if the defendant has met  
 19 the burden of showing that the decision reached would reasonably  
 20 likely have been different absent [counsel's] errors." *Strickland*,  
 21 466 U.S. at 696.

22       Jackson can demonstrate neither deficient performance nor  
 23 prejudice.

24       Counsel did not directly request a continuance but did advise  
 25 the court that they would not be able to effectively represent  
 26 Jackson at a trial the following week. In doing so, counsel also  
 27 noted Jackson's objection, thus preserving his speedy trial  
 28 argument for appeal. The record reflects that the last-minute

1 disclosure of evidence was through no fault of the government,  
2 which had been working diligently to obtain records from outside  
3 state law enforcement agencies. The Ninth Circuit concluded as  
4 much in rejecting Jackson's speedy trial claim on appeal. In  
5 addition, counsel saw a need for extra time to investigate and  
6 file a motion to suppress, which they in fact ultimately did file.  
7 Under these circumstances, counsel's decision to suggest the need  
8 for a continuance, while preserving Jackson's objection, was not  
9 outside the wide range of reasonable representation. Nor, for the  
10 same reason, did counsel's choice cause Jackson prejudice.

11 For much the same reason, counsel's failure to file a motion  
12 to dismiss for speedy trial violation was neither deficient nor  
13 prejudicial. It is not reasonably likely a dismissal under these  
14 circumstances would have been granted.

15 Accordingly, Jackson has not established his claim under  
16 Ground Two.

17 C. Ground Three

18 In Ground Three, Jackson asserts that the court committed a  
19 due process violation when Judge Jones recused himself but left in  
20 place his prior critical adverse ruling. (ECF No. 128 at 2 (Supp  
21 to Mot)). Like Ground One, this claim is procedurally defaulted,  
22 and Jackson has not demonstrated prejudice sufficient to excuse  
23 the default.

24 Under *Davis v. Xerox*, 811 F.2d 1293, 1296 (9th Cir. 1987),  
25 prior rulings of a judge who has recused from a case due to a  
26 conflict of interest must be vacated if the judge was aware of a  
27 disqualifying interest at the time of his or her rulings. Here,  
28 there is no indication of the basis for Judge Jones' recusal, much

1 less evidence that he was aware of this basis at the time of his  
2 ruling. There is furthermore no evidence of bias. Jackson asserts  
3 that Judge Jones was biased against him because "Jackson had been  
4 successful in appealing [his] unconstitutional one hundred and  
5 eight (180) month sentence" in Case No. 3:11-cr-142. But, as noted  
6 above, the change to Jackson's sentence was due to a change in the  
7 law, and pursuant to a joint motion for habeas relief filed by the  
8 government and the defense. There was no appeal or reversal of  
9 Judge Jones' rulings. Even if there had been, "[o]pinions formed  
10 by the judge on the basis of facts introduced or events occurring  
11 in the course of the current proceedings, or of prior proceedings,  
12 do not constitute a basis for a bias or partiality motion unless  
13 they display a deep-seated favoritism or antagonism that would  
14 make fair judgment impossible." *United States v. Hernandez*, 109  
15 F.3d 1450, 1454 (9th Cir. 1997) (quoting *Liteky v. United States*,  
16 510 U.S. 540 (1994)); see also *Withrow v. Larkin*, 421 U.S. 35, 57  
17 ("[I]t is not contrary to due process to allow judges and  
18 administrators who have had their initial decisions reversed on  
19 appeal to confront and decide the same questions a second time  
20 around."); *Wilkinson v. Sullivan*, 2010 WL 4241568, at \*25 (C.D.  
21 Cal. Sept. 7, 2010), *report and recommendation adopted*, 2010 WL  
22 4237330 (C.D. Cal. Oct. 20, 2010) ("Absent proof of the trial  
23 judge's actual bias—which requires something more than the simple  
24 fact that the judge's sentencing decision was reversed on appeal—the  
25 Court must presume the trial judge's honesty and integrity).  
26 Nothing in the record supports Jackson's claim of bias.  
27 Accordingly, Jackson has not established prejudice to excuse the  
28 default of Ground Three, and Ground Three must be dismissed.

## 1                   D. Ground Four

2                   In Ground Four, Jackson asserts that trial and appellate  
 3 counsel were ineffective because they failed to investigate the  
 4 available remedies after a judge disqualifies himself and should  
 5 have moved to vacate Judge Jones' pretrial rulings and/or Jackson's  
 6 judgment of conviction. (ECF No. 128 at 3). For the reasons  
 7 discussed with respect to Ground Three, namely that Jackson has  
 8 failed to establish any bias on the part of Judge Jones or that  
 9 Judge Jones' rulings should or would have been vacated upon motion,  
 10 Jackson has established neither deficient performance nor  
 11 prejudice. Ground Four is without merit.

12 **IV. Motion for Evidentiary Hearing**

13                   The court is not required to conduct a hearing on a § 2255  
 14 motion if "the motion and the files and records of the case  
 15 conclusively show that the prisoner is entitled to no relief." 28  
 16 U.S.C. § 2255(b). Because the motion and files and records of this  
 17 case conclusively show that Jackson is not entitled to relief, his  
 18 request for an evidentiary hearing is denied.

19 **V. Certificate of Appealability**

20                   In order to proceed with an appeal, Jackson must receive a  
 21 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App.  
 22 P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951  
 23 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550,  
 24 551-52 (9th Cir. 2001). Generally, a defendant must make "a  
 25 substantial showing of the denial of a constitutional right" to  
 26 warrant a certificate of appealability. *Allen*, 435 F.3d at 951; 28  
 27 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84  
 28 (2000). "The petitioner must demonstrate that reasonable jurists

1 would find the district court's assessment of the constitutional  
2 claims debatable or wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*,  
3 529 U.S. at 484). In order to meet this threshold inquiry, Jackson  
4 has the burden of demonstrating that the issues are debatable among  
5 jurists of reason; that a court could resolve the issues  
6 differently; or that the questions are adequate to deserve  
7 encouragement to proceed further. *Id.*

8 The court has considered the issues raised by Jackson with  
9 respect to whether they satisfy the standard for issuance of a  
10 certificate of appealability and determines that none meet that  
11 standard. Accordingly, Jackson will be denied a certificate of  
12 appealability.

13 **VI. Conclusion**

14 In accordance with the foregoing, IT IS ORDERED that Jackson's  
15 motion for relief pursuant to 28 U.S.C. § 2255 (ECF No. 125) is  
16 DENIED.

17 IT IS FURTHER ORDERED that Jackson's request for an  
18 evidentiary hearing IS DENIED.

19 IT IS FURTHER ORDERED that Jackson is DENIED a certificate of  
20 appealability.

21 The Clerk of Court shall enter final judgment accordingly.

22 IT IS SO ORDERED.

23 DATED: This 28th day of February, 2023.

24   
25 

---

UNITED STATES DISTRICT JUDGE  
26  
27  
28